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No. 85-2006

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

NATIONAL CAN CORPORATION, *et al.*,
Appellants,

v.

STATE OF WASHINGTON,
DEPARTMENT OF REVENUE,
Appellee.

ON APPEAL FROM THE SUPREME COURT
OF WASHINGTON

BRIEF FOR APPELLANTS

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QUESTIONS PRESENTED

1. May a state, consistent with the Commerce Clause, impose an unapportioned gross receipts tax on the manufacture of goods *for sale outside the state,* while exempting from the tax the identical manufacture of goods *for sale within the state?*

2. If a state imposes a tax on selling but grants *in-state* manufacturers who pay the selling tax an exemption from another tax, may the state—consistent with the Commerce Clause—impose its selling tax on the unapportioned gross receipts of *out-of-state* manufacturers, without granting them a comparable exemption or benefit?

LIST OF PARTIES

Appellants in Docket No. 85-2006 are 71 business enterprises listed at App. F to J.S. Appellants' Rule 28.1 designation appears at the appendix to this brief.

Consolidated with National Can's appeal is *Tyler Pipe Industries, Inc. v. Washington State Department of Revenue,* No. 85-1963, an appeal in which Tyler Pipe is the only appellant.

The State of Washington, through its administrative agency the Department of Revenue, is the sole appellee in both appeals.

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BRIEF FOR APPELLANTS

OPINIONS BELOW

The opinion of the Washington Supreme Court appears at App. A to J.S., and is reported at 105 Wash. 2d 327, 715 P.2d 128 (1986). The unpublished opinion of the Superior Court for Thurston County appears at App. B to J.S. and the judgment of that court is at App. C to J.S.

JURISDICTION

Appellants appeal from the final decision of the Washington Supreme Court rendered March 6, 1986. Notice of Appeal was timely filed in that court and the Superior Court for Thurston County on May 22, 1986. App. D to J.S. National Can docketed its appeal on June 3, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(2).

This Court noted probable jurisdiction on October 6, 1986. 107 S. Ct. 57-58 (1986), J.A. 281. That order consolidated this appeal with that of *Tyler Pipe Industries, Inc. v. Washington State Department of Revenue,* No. 85-1963.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Commerce Clause of the United States Constitution (Art. I, §8, cl.3) and Revised Code of Washington, Title 82, are reproduced in pertinent part at App. E to J.S.

STATEMENT OF THE CASE

FACTS

This appeal arises from 53 actions brought for refund of taxes paid to the State of Washington by 71 manufacturers engaged in interstate commerce.

These manufacturers allege that the Washington taxes at issue violate the Commerce Clause of the United States Constitution. By agreement of the parties, three of the manufacturers were selected to serve as "test cases," representative of the rest. They present three situations:

(i) Manufacturing within Washington and selling outside the state. Kalama Chemical, Inc., and National Can Corporation are representative of companies that manufacture products in Washington for sale outside the state. Washington taxes the privilege of manufacturing within the state. Wash. Rev. Code § 82.04.240. Manufacturers like Kalama and National Can, who sell their products outside the state, must pay the tax. Exempt from the tax, however, are purely local companies, engaging in the identical manufacturing activity in Washington, but selling their products within the state. *See* Wash. Rev. Code § 82.04.440.

(ii) Manufacturing in other states and selling in Washington. Xerox Corporation and National Can Corporation are representative of companies that manufacture products outside Washington for sale within the state.

Washington taxes the privileges of selling at wholesale and at retail. Wash. Rev. Code §§ 82.04.270 & 82.04.250. Wholly local businesses, by paying either of these selling taxes, are awarded an exemption from the State's manufacturing tax. Interstate businesses who manufacture outside Washington—although they are required to pay the same Washington selling taxes—receive no such exemption or comparable benefit. *See* Wash. Rev. Code § 82.04.440.

(iii) Companies engaged in both the foregoing patterns of interstate activites, i.e. manufacturing in Washington for sale outside the state, as well as manufacturing in other states for sale in Washington. National Can Corporation is representative of those companies that combine both the Kalama and Xerox fact patterns.

Washington bases both its manufacturing and selling taxes on 100% of the gross receipts—without apportionment—from interstate activities having some nexus with the State. *See* Wash. Rev. Code §§ 82.04.220, 82.04.240, 82.04.250 and 82.04.270. This is true though the gross receipts are produced by a multistate combination of activities—i.e., by substantial activities in other states as well as activities in Washington. J.A. 174-76, 178-81, 184-85 and 189-91. The stipulated facts show that the taxpayers pay taxes to other states, apportioned to their activities in those states, based on the same income that is part of Washington's unapportioned tax base. J.A. 176-77, 181-82, and 191-92.

PROCEEDINGS BELOW

These 53 cases, presenting similar facts and the same legal issues, were joined for decision by the Superior Court of Thurston County. There being no factual disputes, the facts were stipulated (J.A. 174-92) and the cases proceeded to decision on cross motions for summary judgment. The Superior Court granted the State's motions for summary judgment and dismissed the taxpayers' actions. The 53 cases were consolidated for appeal to the Washington Supreme Court, which affirmed the Superior Court's dismissal of the

taxpayers' complaints, rejecting their contentions that the Washington tax scheme violates the Commerce Clause.

In noting probable jurisdiction, this Court consolidated this appeal with *Tyler Pipe Industries, Inc. v. Washington State Department of Revenue,* No. 85-1963. Tyler Pipe challenges Washington's wholesaling tax as failing to satisfy the Commerce and Due Process Clauses' nexus and "fair relation" requirements, as well as raising claims of discrimination and lack of fair apportionment under its particular facts. *See* Brief for Appellant, *Tyler Pipe Industries, Inc. v. Washington State Department of Revenue,* No. 85-1963.

SUMMARY OF ARGUMENT

The decision below is irreconcilable with the recent decision in *Armco, Inc. v. Hardesty,* 467 U.S. 638 (1984). Like the West Virginia scheme struck down in *Armco*, Washington imposes a gross receipts tax on manufacturing and gross receipts taxes on selling. West Virginia exempted wholly local business from its wholesaling tax that interstate commerce was required to pay. Washington exempts wholly local business from its manufacturing tax that interstate commerce must pay. The result is the same: interstate commerce is subjected to a tax burden not imposed on local commerce.

The discrimination persists regardless of the direction that interstate commerce flows. A Washington manufacturer selling its production outside the state is subject to the manufacturing tax while one selling its goods within the state is not. An out-of-state manufacturer selling in Washington pays the same Washington selling tax as local business does, but does not receive the exemption from the manufacturing tax that is awarded to local business. This Court has consistently held that a state may not give local business such a direct commercial advantage over interstate commerce.

Like the *Armco* dissent, the court below concluded that the manufacturing tax and selling taxes are "compensatory." Even if that conclusion were correct, it would merely lead to viewing Washington's manufacturing and selling taxes

together—as the *Armco* Court did in testing for discrimination. Applying the *Armco* analysis: if another state having nexus with an interstate business like National Can imposed taxes identical to Washington's, the tax burden on National Can would be at least twice the burden imposed on a purely local business.

That risk of multiple burdens is confirmed as a reality by the stipulated facts. Washington subjects these Appellants to an *unapportioned* tax based on 100% of the same receipts that are properly taxed on an *apportioned* basis by other states.

The lower court's conclusion that Washington's taxes can be saved by treating them as "compensatory" is futile because, even when the taxes are viewed together, they discriminate against interstate commerce. Moreover, that compensatory conclusion is wrong. Washington's taxes are imposed on manufacturing and selling—events that this Court held are "not 'substantially equivalent' " and do not support a "compensatory tax" conclusion. *Armco,* 467 U.S. at 643.

ARGUMENT

I. THE CHALLENGED TAXES ARE INDISTINGUISHABLE FROM TAXES THIS COURT HAS RECENTLY STRUCK DOWN AS DISCRIMINATORY.

In recent years it has frequently been necessary for this Court to strike down state taxes that have discriminated against interstate commerce.[1] A common element in such cases is the attempt to subject interstate commerce to tax burdens *not* imposed on local business or otherwise to favor local business with tax benefits denied to interstate commerce.

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[1]*See, e.g., Boston Stock Exchange v. State Tax Commission,* 429 U.S. 318 (1977); *Maryland v. Louisiana,* 451 U.S. 725 (1981); *Westinghouse Electric Corp. v. Tully,* 466 U.S. 388 (1984); *Bacchus Imports, Ltd. v. Dias,* 468 U.S. 263 (1984); *Armco, Inc. v. Hardesty,* 467 U.S. 638 (1984); *Arizona Public Service Co. v. Snead,* 441 U.S. 141 (1979).

This appeal presents questions answered by *Armco, Inc. v. Hardesty,* 467 U.S. 638 (1984). There a tax imposed on interstate commerce was invalidated because local business was exempt from the tax. Armco was an Ohio manufacturer selling its products into West Virginia. West Virginia imposed an unapportioned gross receipts tax on Armco's selling activity that local manufacturers engaged in the same selling activity did not pay. This Court found the discrimination of the tax to be revealed on its face. Noting that "a State may not tax a transaction or incident more heavily when it crosses state lines than when it occurs entirely within the State," the Court found that the West Virginia tax "appears to have just this effect." *Id.* at 642. The specific vice of the West Virginia tax was that "[t]he tax provides that two companies selling tangible property at wholesale in West Virginia will be treated differently depending on whether the taxpayer conducts manufacturing in the State or out of it." *Id.* National Can finds itself in just such a situation.

Like Armco, National Can is taxed for engaging in the exact activity performed by wholly local businesses who are not taxed. National Can manufactures products in Washington and sells a portion of them outside the state.[2] Washington imposes a gross receipts tax on manufacturing, but allows an exemption from the tax on the condition that the manufacturer sells the products locally. Wash. Rev. Code §§ 82.04.240 & 82.04.440. National Can's manufacturing activity is taxed because it sells out of state instead of locally.

West Virginia's exemption from its *selling* tax depended on whether the taxpayer *manufactured* in the state or out of it. Similarly, Washington's exemption from its *manufacturing* tax depends on whether the taxpayer *sells* in the state or out of it. This mirror-image similarity results from the fact that Washington once had West Virginia's scheme, but subsequently reversed the tax and the exemption. A 1948 decision of the Washington Supreme Court struck down the prior

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[2] This statement also describes the Kalama Chemical fact pattern.

scheme, anticipating this Court's *Armco* decision.[3] The Washington legislature responded by reversing the scheme so that wholly local business is now exempt from the manufacturing tax instead of the selling tax.[4] The defect remains the same. Local business is exempted from a tax that interstate commerce is required to pay.

On review in 1951, the Washington court readily saw the legislature's reversal as semantic rather than a change of economic substance; but it believed, based on then extant authorities, that Commerce Clause issues were controlled by such "verbal niceties."[5] The State itself has admitted to this Court that its present tax remains "very similar" to that struck down in *Armco*. Brief of the State of Washington Department of Revenue as Amicus Curiae at 1, *Armco, Inc. v. Hardesty,* 467 U.S. 638 (1984). This appeal tests whether purely semantic formalisms from an earlier day can defeat the substance of the *Armco* decision in an era when this Court has repudiated the exaltation of formalities over economic substance. *See Complete Auto Transit, Inc. v. Brady,* 430 U.S. 274, 288-89 (1977), *overruling Spector Motor Service, Inc. v. O'Connor,* 340 U.S. 602 (1951), and rejecting earlier Commerce Clause analysis that depended on the draftman's art rather than the economic effect of a tax.

Washington's scheme—viewed in the context of National Can's sale into Washington of products that it manufactures in other states[6]—closely resembles another tax held to be facially discriminatory. *See Maryland v. Louisiana,* 451 U.S. 725 (1981). Louisiana imposed a "First-Use Tax" on natural gas brought in from the outer continental shelf ("OCS").

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[3] *Columbia Steel Co. v. State,* 30 Wash. 2d 658, 192 P.2d 976 (1948), *cited with approval, Armco, Inc. v. Hardesty,* 467 U.S. 638, 642 & 645 n.8 (1984).

[4] *See* 1950 Wash. Laws Spec. Sess., ch.5, § 2 (codified at Wash. Rev. Code § 82.04.440).

[5] *B.F. Goodrich v. State,* 38 Wash. 2d 663, 668, 231 P.2d 325, 328, *cert. denied,* 342 U.S. 876 (1951).

[6] The Xerox pattern also involves companies that manufacture products in other states for sale in Washington.

Local gas producers received certain tax benefits, notably one described by the Court as follows:

> [A]n owner paying the First-Use Tax on OCS gas receives an equivalent tax credit on any state severance tax owed in connection with production in Louisiana.

Id. at 756. This Court found that the Louisiana credit favored local producers "[o]n its face." *Id.* That was because

> [t]he obvious economic effect of this Severance Tax Credit is to encourage natural gas owners involved in the production of OCS gas to invest in mineral exploration and development within Louisiana rather than to invest in further OCS development or in production in other states.

451 U.S. at 756-57. The economic effect observed by the Court was "obvious" because the tax benefit offered by Louisiana could be used only within that state.

Washington's taxes have this same economic effect. National Can and other out-of-state manufacturers (including Xerox) pay the selling tax that wholly local business pays, but local business is awarded an exemption from the manufacturing tax. Out-of-state manufacturers receive no comparable benefit. As in *Maryland v. Louisiana,* the exemption thus operates as an inducement for interstate commerce to shift its production into Washington rather than invest in other states.[7]

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[7]*See Westinghouse Electric Corp. v. Tully,* 466 U.S. 388 (1984) (striking down as discriminatory a tax credit that depended on whether the taxpayer exported from in state or out of state locations). *See also Arizona Public Service Co. v. Snead,* 441 U.S. 141 (1979), where this Court invalidated a state tax under a federal statute prohibiting discrimination against interstate commerce. The tax was imposed on companies generating electricity who were awarded a credit against a tax on the sale of the electricity—a credit having no value unless the electricity was sold within the state.

The court below has turned a blind eye to these infirmities in Washington's tax, opining that "out-of-state manufacturers selling in state gain no tax advantage by moving their manufacturing operations in state." App. to J.S. at A-10. The court ignored the advantage that out-of-state manufacturers selling within the state would gain by moving their manufacturing operations into Washington—i.e., manufacturing free of any tax. This advantage is illegal because "[t]he obvious economic effect . . . is to encourage . . . owners involved in [production] to invest in [the taxing state] rather than to invest . . . in production in other states." *Maryland v. Louisiana,* 451 U.S. at 756-57.

Referring to in-state manufacturers like National Can and Kalama, the court below opined that "[i]n-state manufacturers selling out of state do not gain a tax advantage by shifting sales of their product to the local market." App. to J.S. at A-10. Again, the court ignored the obvious tax advantage that would be gained by shifting from out-of-state selling to local selling—i.e., exemption from the tax otherwise payable on manufacturing. Wash. Rev. Code § 82.04.440. Shifting to local selling would, of course, incur a Washington tax on selling (Wash. Rev. Code §§ 82.04.250 or 82.04.270), but this would be offset by avoiding exposure to the taxes of other states based on selling activities. The exemption from Washington's tax on manufacturing remains a net advantage to local sellers.[8]

The Washington court's failure to see the advantage to local business stems from its reliance on the State's claim that "[a] business that manufactures and/or sells in Washington pays the same amount of Washington tax." *See* Appellee's Motion to Dismiss or Affirm at 16. If the challenged taxes were imposed on goods, it might be significant that National

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[8] In *Westinghouse Electric Corp. v. Tully,* 466 U.S. 388 (1984), the Court rejected a contention that a credit giving a direct commercial advantage to in-state business would be acceptable even if the credit-induced increase of in-state business results in a higher tax after allowing for the credit. *Id.* at 401 n.9, Table B.

Can would pay the same tax on a given amount of goods if it "manufactures and/or sells" them in Washington. The error in the "same amount of tax" claim is apparent, however, from the disparity in tax on a given amount of *business activity*—which is, after all, the privilege being taxed.[9] The disparity is blatant: a Washington manufacturer selling \$1,000 of goods *locally* pays zero tax on its manufacturing activity. A Washington manufacturer like National Can, selling an identical \$1,000 of goods out of state, pays a Washington manufacturing tax of \$4.40.

The disparity persists when National Can sells in Washington \$1,000 of goods that it manufactured out of state, because it pays a selling tax of \$4.40. The tax cost to National Can for \$2,000 worth of activities is thus a tax of \$8.80—\$4.40 on \$1,000 of manufacturing activity plus \$4.40 tax on \$1,000 of selling activity. A similarly situated local business that manufactures and sells \$1,000 of goods in Washington also engages in \$1,000 of manufacturing activity and \$1,000 of selling activity (\$2,000 of activities), but pays a tax of only \$4.40. Thus, National Can pays Washington twice the tax that a wholly local business pays for the *same quantum of activities.* For another example of this disparity, see *Fibreboard Paper Products Corporation v. State.*[10]

The court below described the advantage that Washington gives to local commerce as "two activities for the price of one." App. to J.S. at A-15. Such an advantage is not to be confused with the "fair encouragement" that the *Armco*

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[9]*See, e.g.,* RCW 82.04.220. The Washington court has expressly held that it "is the activity of manufacturing, not the product, which gets taxed." *Fibreboard Paper Products Corp. v. State,* 66 Wash. 2d 87, 90, 401 P.2d 623, 625 (1965), discussed *infra* at note 10.

[10]66 Wash. 2d 87, 401 P.2d 623 (1965). Fibreboard began its manufacturing process in Washington and completed it in Oregon before returning the goods to Washington for sale. A wholly local manufacturer would have paid to Washington only the selling tax and been exempt from the manufacturing tax. By contrast, Fibreboard was required to pay two Washington taxes—a tax on its manutacturing and a tax on its selling, because part of its manufacturing occurred out of state.

Court described in direct response to Washington's *amicus* brief. If Washington wished to offer "fair encouragement" for in-state manufacture, it could do so by imposing a tax only on selling.[11] In that situation, as the Court observed in *Armco,* an out-of-state manufacturer might still bear the burden of two taxes if the state of manufacture taxed manufacturing. The two taxes would result from the coincidence of different taxing systems in the two states. But such "fair encouragement" comes at a price. When the flow of the interstate traffic is in the opposite direction (i.e., manufacturing in Washington and selling out of state), Washington would not receive any tax. Washington is unwilling to accept this consequence of "fair encouragement." It insists on taxing "both ends" of the manufacturing-selling enterprise when interstate commerce is involved, but only the selling end if the business is wholly local.

II. WASHINGTON'S TAXES—DISCRIMINATORY ON THEIR FACE—CANNOT BE SAVED BY A "COMPENSATING TAX" THEORY.

The court below held that Washington's manufacturing tax and its selling taxes are valid because they are "compensatory."[12] App. to J.S. at A-11. Like the similar

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[11] Iowa achieved this kind of encouragement by adopting the sales factor as the single factor in its apportionment formula. *Moorman Mfg. Co. v. Bair,* 437 U.S. 267 (1978). A sharply divided court approved the encouragement despite the possibility of multiple taxation resulting from application of a 3-factor formula in the state of production. This Court did not permit such latitude, however, where a governing statute required that the measure of the tax be "the net income of the corporation . . . as is fairly attributable to any trade or business carried on or engaged in within the [taxing jurisdiction]." *General Motors Corp. v. District of Columbia,* 380 U.S. 553 (1965).

[12] The court below adopted the arguments made by both Washington and West Virginia in *Armco*—and rejected by this Court. *See* Brief of State of Washington Department of Revenue as Amicus Curiae at 6-7 and 16-18, and Appellee's Brief on the Merits at 79-84, *Armco, Inc. v. Hardesty,* 467 U.S. 638 (1984).

holding by the West Virginia Supreme Court—reversed by this Court in *Armco*—this conclusion is both futile and wrong.

A. When Washington's Tax Scheme Is Viewed As a Whole, Discrimination Persists.

Even if Washington's taxes are viewed as "compensatory," they discriminate against interstate commerce. That is because a compensatory conclusion simply requires that the taxes be considered together in testing for discrimination. Indeed, the court below premised its compensatory analysis on an insistence that Washington's taxes on manufacturing and selling are imposed upon a "single economic unit." [13]

Viewing the two taxes together will avail the State nothing. As the *Armco* Court said in responding to the compensatory argument: "Moreover, when the two taxes are considered together, discrimination against interstate commerce persists." 467 U.S. at 644. The Court explained:

> If Ohio or any of the other 48 States imposes a like tax

[13] Any other view was declared to be a "disturbing formalism" that "would force us to regard the gross receipts tax system as consisting of two separate taxes, manufacturing and selling, and to retreat from the *Complete Auto* 'practical effects' test." App. to J.S. at A-13. The court acknowledged the "economic realities . . . that a business unit frequently operates at several levels in the distribution chain and the cost of those various operations come to bear on the single product which serves as the measure of taxation." App. to J.S. at A-11.

But the court was unable to adhere consistently to its own premise for the compensatory conclusion. After initially insisting that the taxes should be regarded as imposed upon a "single economic unit," the court reversed itself. In answering a contention that the Washington taxes lack fair apportionment, the court reasoned that "the 'internal consistency' test articulated in *Container Corp.* and *Armco* does not apply to the determination whether the B & O tax is fairly apportioned. This is because Washington does not tax the income of a unitary business, but rather taxes only the privileges of manufacturing or selling within the state." App. to J.S. at A-14.

> on its manufacturers—which they have every right to do—then Armco and others from out of State will pay both a manufacturing tax and a wholesale tax while sellers resident in West Virginia will pay only the manufacturing tax.

Id.[14] If other states imposed taxes like Washington's, then Appellants would pay both a manufacturing tax and a wholesaling tax, while manufacturer-sellers resident in Washington would pay only the wholesaling tax. Far from exonerating Washington's taxes, therefore, viewing them together confirms their discrimination.[15]

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[14]In the next paragraph of its opinion, the Court identified this test for discrimination as a requirement of "internal consistency." 467 U.S. at 644. The internal inconsistency in Washington's scheme results from (i) taxing *each* of an enterprise's multiple activities—i.e., extracting, manufacturing, wholesaling and retailing, and (ii) *exempting all but the last* of such activities performed within Washington. The enterprise that operates in two or more states will inevitably have a "last" activity in every state with which it has minimal contact. By contrast, the business that confines itself to purely local activities is assured of paying tax on no more than one activity.

[15]Washington has, in fact, explicitly admitted to the Court that its tax scheme is internally inconsistent:

> The discrimination argument we consider here . . . would arise from the combined effects of two tax systems: that of West Virginia and that of another state should it also choose to adopt the same system as West Virginia. If Armco were subject to both states' systems, because it manufactured in one state and sold the product so manufactured in the other, the combined taxes would be greater than the tax imposed on Armco by West Virginia alone.
>
> . . . That same possibility exists under Washington's business and occupation tax . . . .

Brief of the State of Washington as Amicus Curiae at 18, *Armco, Inc. v. Hardesty,* 467 U.S. 638 (1984). *See also* App. K to J.S. ("executive briefing" chart used to explain Washington's "*Armco* problem" to the state legislature). The chart graphically reveals that Washington's scheme results in "2 taxes" on interstate commerce, but only "1 tax" for wholly local commerce.

B. The Washington Manufacturing Tax and Selling Taxes Are Not Compensatory.

The "compensatory" rationale is wrong as well as futile. Washington's taxes are imposed on the same events as West Virginia's—events held by this Court not to be "substantially equivalent." 467 U.S. at 643. In *Armco,* West Virginia had similarly argued that it was justified in imposing its wholesaling tax on interstate business—although local business was exempt—because local business was required to pay a manufacturing tax. The Court rejected this contention because: "[M]anufacturing and wholesaling are not 'substantially equivalent events' such that the heavy tax on in-state manufacturers can be said to compensate for the admittedly lighter burden placed on wholesalers from out of State." *Id.*

Acknowledging this Court's explicit holding on the point (App. to J.S. at A-7), the court below finessed the *Armco* analysis by reversing it. Ignoring the threshold requirement that the taxes be imposed on "substantially equivalent events," the court shifted its focus to the mechanical structure of the tax system—concluding that it was consistent with a compensatory tax theory.[16] The Court reasoned *from* that

[16] The court below accepted Washington's newly devised argument that its taxes "differ significantly" from West Virginia's. App. to J.S. at A-7. The alleged point of difference is in the relative amounts of tax imposed on manufacturing versus selling by the two states. The Washington court seemed to premise its structural analysis on a patent misunderstanding of the tax struck down in *Armco.* The court below erroneously stated that West Virginia's wholesaling tax on interstate businesses was imposed at a rate of 0.88%, while the manufacturing tax imposed on local businesses was imposed at a much lower rate of 0.27%. App. to J.S. at A-7. (If true, such a disparity would, of course, have been an obvious discrimination.) In reality, however, the West Virginia tax rates were *exactly opposite* those stated by the Washington court—as this Court noted in *Armco. See* 467 U.S. at 640 n.2, 641 & n.5. Thus, this Court's conclusions were reached despite local business having been taxed on manufacturing at a rate over three times the wholesaling tax rate imposed on interstate commerce. This Court was unable to say which portion—if any—of West Virginia's manufacturing tax was attributable to manufacturing, and which portion to selling. Washington's taxes present the same problem.

conclusion *back* to a holding that manufacturing and selling must, therefore, be substantially equivalent events—in Washington, if nowhere else. App. to J.S. at A-9.[17]

This attempted evasion is refuted by an earlier admission made to this Court. When *Armco* was being considered, Washington sought this Court's consideration of its *amicus* brief by pointing out that "[t]he Washington business and occupation tax . . . is a gross receipts tax very similar to the West Virginia tax." Brief of State of Washington as Amicus Curiae at 1, *Armco, Inc. v. Hardesty,* 467 U.S. 638 (1984). Now Washington has retreated from its prior candor and asserts that its taxes "differ significantly" from West Virginia's. Despite Washington's new view of its taxes, what was fatal to West Virginia's "compensating" claim is likewise fatal to Washington's. The taxes claimed to be "compensatory" are imposed on manufacturing and wholesaling—events that are no more equivalent in Washington than they are in West Virginia.

III. WASHINGTON'S TAXES ARE NOT FAIRLY APPORTIONED, AS REQUIRED BY THE COMMERCE CLAUSE.

Besides their impermissible discrimination, the challenged taxes are invalid for another, independent reason. They are not fairly apportioned.

State taxes must be fairly apportioned. *See Gwin, White &*

[17]Nor would it follow that Washington's taxes are "compensatory" merely because of alleged structural similarity. *See, e.g., Maryland v. Louisiana,* 451 U.S. 725 (1981). The taxes there were structurally identical —having precisely the same rates and measures. *Id.* at 731; *see also, Armco,* 467 U.S. at 642-43. Nevertheless, the taxes were held not compensatory because they were not imposed on substantially equivalent events. 451 U.S. at 759. *See also Columbia Steel Co. v. State,* 30 Wash. 2d 658, 192 P.2d 976 (1948), *cited with approval, Armco,* 467 U.S. at 642 & 645 n.8. In *Columbia Steel,* the 1948 version of Washington's own selling tax discriminated against interstate commerce even though local commerce paid a manufacturing tax at an identical rate on the same base.

Prince, Inc. v. Henneford, 305 U.S. 434, 438-39 (1939); and *Complete Auto Transit, Inc. v. Brady,* 430 U.S. 274, 278 (1977). In *Gwin, White & Prince,* this Court struck down a Washington gross receipts tax because it was unapportioned.[18] The taxpayer conducted its business (commission selling) in more than one state. The Washington Supreme Court sustained a tax on 100% of the business's receipts. This Court reversed because "other states to which the commerce extends may, with equal right, lay a tax similarly measured." 305 U.S. at 439.

The same problem is present here. The manufacturing and selling business of each Appellant is conducted in more than one state. In a decision heavily relied upon by the court below, *General Motors Corp. v. Washington,* 377 U.S. 436 (1964), this Court characterized Washington's wholesaling tax as "unapportioned and . . . therefore, suspect." *Id.* at 448.[19]

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[18]Washington now apportions that particular tax. *See* Wash. Rev. Code §§ 82.04.460 & 82.04.290 ("tax on other business or service activities").

[19]*See also Standard Pressed Steel Co. v. State,* 419 U.S. 560 (1975), again involving Washington's wholesaling tax, "levied on the unapportioned gross receipts of appellant resulting from its sale of fasteners to Boeing." *Id.* at 561-62. (Compare the observation, *id.* at 563-64, that the tax was " 'apportioned exactly to the activities taxed,' all of which [were] intrastate.") Washington's manufacturing tax was not before the Court in *General Motors* or *Standard Pressed Steel.*

The 5-justice majority in *General Motors* did not address the discrimination issue presented here. 377 U.S. at 457 (Goldberg, Stewart, and White, JJ., dissenting). Nor did it consider the requirement of internal consistency, articulated in *Container Corp. of America v. Franchise Tax Board,* 463 U.S. 159, 169 (1983), and applied in *Armco, Inc. v. Hardesty,* 467 U.S. 638, 644 (1984). Rather, the majority opinion (and the brief opinion in *Standard Pressed Steel* that followed it) focused on a nexus issue not present in this appeal of National Can *et al.* At the end, the majority addressed briefly the question of actual multiple imposition, finding the taxpayer's proof insufficient—a deficiency not present in the instant stipulated record reflecting multiple taxation. J.A. 174-82, 184-85 and 189-92.

Unlike the majority, the four Justices dissenting in *General Motors* reached discrimination and apportionment issues. Justice Brennan would

Here, Washington's manufacturing tax and selling taxes are based on 100% of the gross receipts from Appellants' activities in Washington and other states. J.A. 174-76, 178-81, 184-85, and 189-91. These other states have the same right as Washington to levy taxes on this commerce. The taxes challenged here thus have the same vice that the Court condemned in *Gwin, White & Prince*. Moreover, other states *do* levy taxes on Appellants, apportioned to their activities in those states, on the same receipts that are part of Washington's unapportioned tax base. J.A. 176-77, 181-82, and 191-92.

The challenged Washington taxes are therefore unconstitutional for lack of fair apportionment. For a more thorough discussion of this constitutional defect, see Brief of Amici Curiae Amcord, Inc., *et al.* in Support of the Appellants.

CONCLUSION

For the reasons expressed above, Appellants ask that the decision below be reversed.

Dated: November 19, 1986.

Respectfully submitted,

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have required apportionment because "if commercial activity in more than one State results in a sale in one of them, that State may not claim as all its own the gross receipts to which the activity within its borders has contributed only a part." 377 U.S. at 451. Justices Goldberg, Stewart, and White anticipated the *Armco* holding by addressing the discrimination and multiple burden problems, and concluding that the Washington tax failed to satisfy Commerce Clause requirements. 377 U.S. at 457-62.

APPENDIX

RULE 28.1 DESIGNATION

Pursuant to Rule 28.1, Appellants state that the only changes to their original Designation of Corporate Relationships, App. G to J.S., as amended by footnote 1 to the Brief in Opposition to Motion to Dismiss or Affirm are: Allis-Chalmers Power Systems, Inc. is now a subsidiary of, and Pension Benefit Guaranty Corporation now owns 5% or more of, Appellant Allis-Chalmers Corporation. The following are no longer subsidiaries or affiliates of Appellant Bethlehem Steel Corporation: Southeast, Incorporated, Erie Mining Company, A Limited Partnership, Met-Mex Penoles, S.A. de C.V. and Minera Apolo, S.A. de C.V.; the correct name of one of Bethlehem Steel Corporation's subsidiaries is Mineracoes Brasileiras Reunidas MBR. Peugeot Company S.A. is no longer a subsidiary of Appellant Chrysler Corporation. Williams Equine Products, Inc. is affiliated with Appellant Cummins Engine. The only entities now owning 5% or more of Appellant Data I/O Corporation are Bruce E. Gladstone and The Independent Investment Company, Ltd. The Dyson Kissner Moran Corporation and B.S.D. Diversified Co., Inc. are the correct names of two parents of Appellants Fentron Building Products Co., Heath Tecna Aerospace Co. and Korry Electronics Co., all divisions of Criton Technologies. Starnet Corporation is no longer a subsidiary of, and Ceradyne Advanced Products, Inc. and First Nationwide Network, Inc. are now subsidiaries of, Appellant Ford Motor Company. Mattel Molds, Ltd. (Taiwan) is no longer, and Ma-ba Corporation (Japan) is now, a subsidiary of Appellant Mattel, Inc. Templeton, Galbraith & Hansberger, Ltd. and Wellington Management Co./Thorndyke, Doran, Paine & Lewis are the correct names of some of Appellant Reynolds Metals Company's parents; Robertshaw Controls Company is no longer a subsidiary and Jamaica Reynolds Bauxite Partners, Jefferson Village Associates, Reynolds Metals Company & Associate, L.P. and Eastwick Joint Venture are no longer affiliates of Reynolds Metals Company; Austria Dosen GmbH, Reynolds Aluminium

Holdinggesellschaft mbH, RMC Holdings (Delaware), Inc., Austria Dosen Gesellschaft mbH & Co. KG, 1401 17th Street Associates, Crown Oak Associates of Penfield, Gerro Reynolds Dosenwerk GmbH & Co. KG, Kimbrook Manor Associates, Lakeside Village Associates, Ltd. and LaSalle Square Associates are now affiliates of Reynolds Metals Company. Appellant Scott Paper Company is no longer affiliated with The Bowater-Scott Corporation of Australia, Ltd., Papeles Scott de Columbia, S.A. or Bowater-Scott Corporation Limited; Canso Chemicals Limited and Compania Industrial de San Cristobal are the correct names of two of Scott Paper Company's affiliates.